

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

2-21
Bp/s
77-6194

United States Court of Appeals

FOR THE SECOND CIRCUIT

WATERMAN STEAMSHIP CORPORATION,

Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLANT
WATERMAN STEAMSHIP CORPORATION**

BURLINGHAM UNDERWOOD & LORD

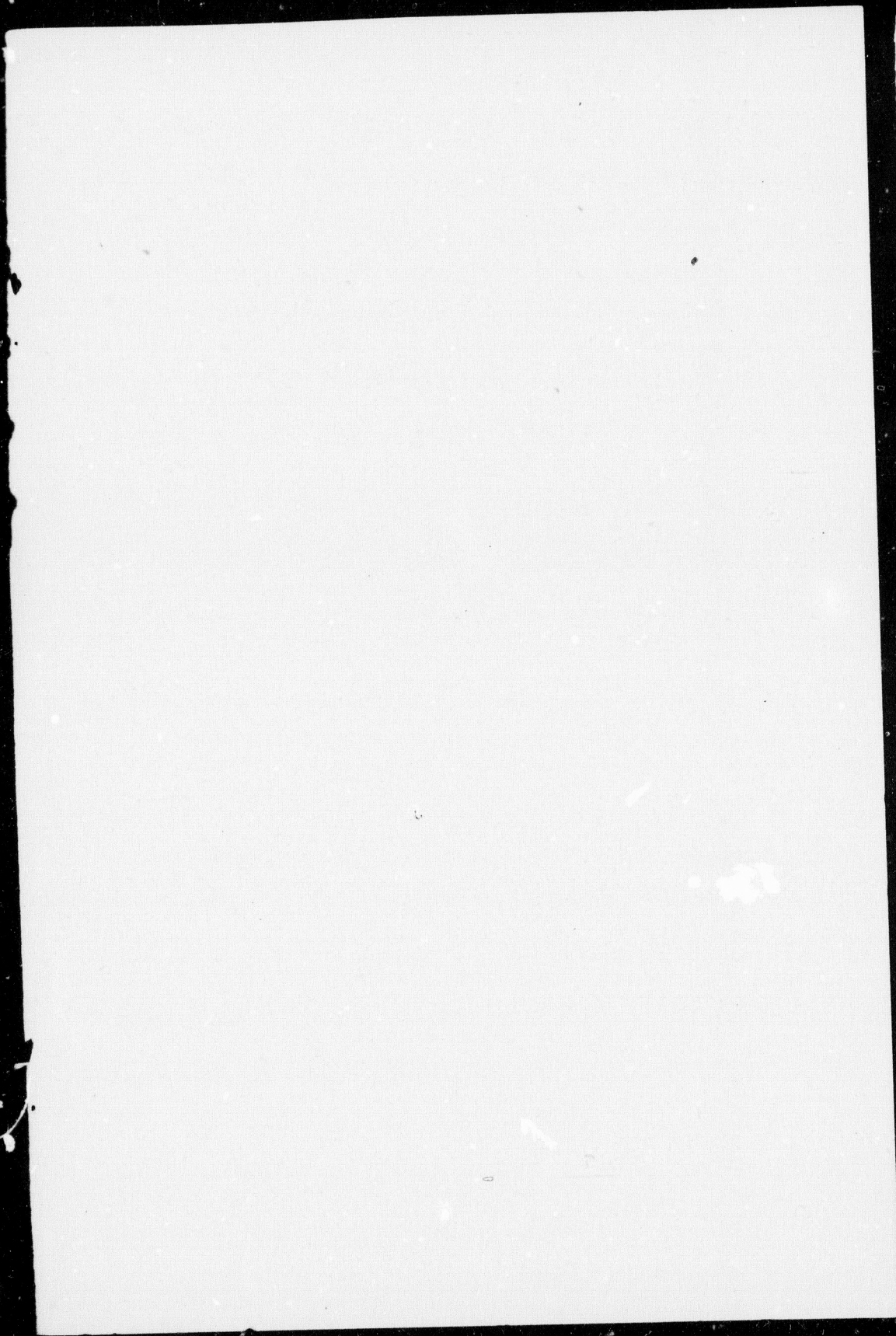
Attorneys for Plaintiff-Appellant

Waterman Steamship Corporation

One Battery Park Plaza

New York, New York 10004

(212) 422-7585



I N D E X

	PAGE
Preliminary Statement	1
Statement of Issue Presented for Review	1
Statement of Case	2
ARGUMENT:	
I. Plaintiff is entitled to a recovery under the ex- press terms of the contract	6
A. The terms of the contract are clear	6
B. The Court below confused "Freight" with "Rate"	10
II. Any ambiguity should be resolved against De- fendant	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:

<i>Armco Steel Corp. v. Stans</i> , 431 F.2d 779 (2 Cir. 1970) ..	6
<i>Eddy v. Prudence Bonds Corp.</i> , 165 F.2d 157 (2 Cir.), cert. denied, 333 U.S. 845 (1948)	11
<i>General Warehousing Two v. United States</i> , 389 F.2d 1016 (Ct. Cl. 1967)	12

	PAGE
<i>Instruments for Industry v. United States</i> , 456 F.2d 1157 (2 Cir. 1974)	11
<i>Jones v. United States</i> , 304 F. Supp. 94 (S.D.N.Y. 1969), aff'd, 421 F.2d 835 (2 Cir. 1970)	11
<i>J. W. Bateson Co. v. United States</i> , 450 F.2d 896 (Ct. Cl. 1971)	11
<i>Law Research Serv. v. Crook</i> , 524 F.2d 301 (2 Cir. 1975)	10-11
<i>National Equipment Rental v. Reagin</i> , 338 F.2d 759 (2 Cir. 1964)	9
<i>Rawleigh, Moses & Co. v. United States</i> , 475 F.2d 606 (Ct. Cl. 1973)	12
<i>Stamicarbon v. American Cyanamid Co.</i> , 506 F.2d 532 (2 Cir. 1974)	11
<i>Standard Title Ins. Co. v. United Pac. Ins. Co.</i> , 364 F.2d 287 (8 Cir. 1966)	9
<i>United States v. Isthmian S.S. Co.</i> , 359 U.S. 314 (1959)	13
<i>United States v. Seckinger</i> , 397 U.S. 203 (1970)	11

United States Court of Appeals

FOR THE SECOND CIRCUIT

WATERMAN STEAMSHIP CORPORATION,

Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT WATERMAN STEAMSHIP CORPORATION (DEFERRED APPENDIX METHOD BEING FOLLOWED PURSUANT TO STIPULATION BETWEEN THE PARTIES)

Preliminary Statement

This admiralty appeal arises from cross-motions for summary judgment and involves the construction of certain freight provisions of a contract of ocean carriage.

Statement of Issue Presented for Review

Does the contract provide, in connection with exclusive barge use, for the minimum barge tonnage to be multiplied by a rate which is increased by offloading charges?

Statement of Case

In 1974, the Military Sealift Command (hereinafter referred to as "MSC"), an agency of defendant, contracted with plaintiff for the carriage of military vehicles on LASH (lighter aboard ship) barges from the United States to the Middle East (10a). The terms of carriage were set forth in MSC's *Shipping Agreement and Rate Guide*, effective July 1, 1974 and amended January 1, 1975 (10a).

All rates and charges were applicable per "measurement" ton of 40 cubic feet of cargo (15a). However, MSC had the option to require "exclusive use" of a LASH barge, as, for example, when an awkwardly configured cargo was shipped, in which event the contract provided a "minimum charge," computed by multiplying the "rate" times a certain minimum tonnage.

In its original form, the exclusive use option was set forth as follows:

"E. BARGE EXCLUSIVE USE PAYMENT: Cargo shipped in a barge required for exclusive use by the Contracting Officer for military cargo *shall be freighted at the applicable cargo category rate subject to a minimum charge per barge computed by applying the Cargo NOS rate to seventy five percent (75%) of the inside cubic capacity of the barge.*" (16a) [Emphasis added.]

As amended in January 1975, the option was changed to a minimum charge as follows:

"E. MINIMUM PER BARGE: Vehicles shipped in a barge *shall be freighted at the applicable rate subject to a minimum charge per barge computed by applying the*

lowest of the three commodity *rates* NOS, light vehicles, heavy vehicles to 300 MT for LASH barges and 600 MT for SEABEE barges. This minimum is applicable only when the barge is loaded exclusively with vehicles booked under the terms of this Agreement." (20a) [Emphasis added.]

The differences between the two provisions are not significant since all of the cargoes involved here were military vehicles and the parties have agreed that 75% of the inside cubic capacity of a LASH barge is equal to 300 measurement tons (12a).

The contract contemplated a standard voyage to the Middle East via the Suez Canal. Whenever the canal was blocked, the "rates" were increased by a 25% surcharge to cover the additional costs of a longer voyage via the Cape of Good Hope, under a provision which read:

"13. SUEZ CANAL SURCHARGE: The *rates* for routes which would normally involve transit of the Suez Canal do not contain a contingency for Suez Canal blockage. Accordingly, the Carrier shall be reimbursed a surcharge covering additional costs resulting from such blockage. The appropriate surcharge shall be subject to separate negotiations between the Carrier and the Contracting Officer when cargo is offered for shipment in accordance with the ARTICLE entitled "CANAL BLOCKAGE" in this Agreement. *In accordance with commercial practice, such surcharge shall be applied on the basic rate and to the charges for stevedoring and terminal services* as set forth in the STATEMENT OF RATES when stevedoring is performed by or for the account of the carrier." (17a) [Emphasis added.]

The "basic rates" for ocean carriage were calculated on an "FIO" (free-in-and-out) basis, i.e., MSC was responsible for discharging the cargo at destination (15a). However, at its option MSC could require plaintiff to arrange for offloading the cargo in which event the contract provided for the basic "FIO rates" to be "increased" by certain offloading charges. In pertinent part, the freight terms of the offloading option provided:

C. When the Government exercises the [offloading] option * * * *the applicable FIO rates set forth herein shall be increased by the charges set forth in the Table of Charges for Stevedoring and Terminal Services to cover cost of discharging or loading between place of rest on the ship and the end of ship's tackle at the overseas port. (16a-17a) [Emphasis added.]*

The Table of Charges for Stevedoring and Terminal Services recited in its preamble that

*The following charge shall be added to the rates * * * when cargo loading or discharging at the overseas port is performed under the [offloading] option * * * ."* (18a, 21a) [Emphasis added.]

Plaintiff carried military vehicles on LASH barges for MSC on ten voyages around the Cape of Good Hope to the Middle East during 1974-75 (10a, 11a). Seven voyages were from Gulf ports, three were from Baltimore (11a). On all ten voyages, defendant exercised both its option for exclusive barge use and its option to require plaintiff to discharge the cargo at destination (11a).

On all ten voyages, plaintiff computed the minimum charge for exclusive barge use on the basis of a composite

rate consisting of the basic FIO rate for ocean carriage plus the offloading charges and the Suez Canal surcharge. On each of the three voyages from Baltimore, plaintiff invoiced the total minimum charges on a single invoice, which MSC paid in full (13a).

However, under MSC's standard billing instructions, plaintiff was entitled to bill the ocean carriage portion of the freight separately from the other freight components, in order to receive the bulk of the freight shortly after the vessel arrived at destination and before discharge was completed (22a). On the seven voyages from the Gulf, plaintiff invoiced MSC separately for the ocean carriage portion of the minimum charge and then for the offloading portion of the minimum charge. MSC paid the invoices for ocean carriage in full but refused to pay \$113,780.41 out of the other invoices on the ground that the minimum tonnage per barge did not apply to the offloading charges, and defendant paid offloading charges only for the actual tonnage of cargo discharged (12a-13a).

Plaintiff brought suit herein to recover the amounts of freight which were improperly withheld on the seven voyages from the Gulf. After plaintiff filed suit, MSC withheld an additional \$16,989.48 in other funds due plaintiff on the ground that MSC had overpaid offloading charges on the three voyages from Baltimore (14a). The parties have informally agreed that the propriety of withholding freights on the three Baltimore voyages will also be determined by this appeal.

Shortly after issue was joined below, the parties filed cross-motions for summary judgment. On November 21, 1977 the Hon. Kevin T. Duffy ruled in favor of defendants and dismissed the complaint (39a-46a).

ARGUMENT

I.

Plaintiff Is Entitled to a Recovery Under the Express Terms of the Contract.

A. *The Terms of the Contract Are Clear.*

The freight provisions of a contract of ocean carriage can be structured in an almost infinite variety of ways. Here, the parties were dealing with a newly-developed mode of ocean transportation whose characteristics were succinctly described by this Court in *Armco Steel Corp. v. Stans*, 431 F.2d 779, 782-83 (2 Cir. 1970). They deliberately selected a particular freight structure to compensate for the carriage of vehicles in LASH barges, and the terms could hardly have been more plainly stated: plaintiff was entitled to receive a minimum charge for exclusive barge use as determined by multiplying the applicable "rate" times a certain minimum tonnage.

The basic FIO rates differed for the carriage of vehicles and NOS (not-otherwise-specified) cargoes, with the NOS and heavy vehicle basic FIO rates being higher than the light vehicle basic FIO rate (19a).¹ Nevertheless, for the vehicles actually carried on all ten voyages, the contract originally referred to the NOS rate for calculating the minimum charge for exclusive barge use (16a). Later, the contract was amended to refer to the lowest of the three basic commodity rates as the predicate for determining the minimum charge (20a).

¹ Three ocean carriers were covered by this contract in connection with break-bulk services by LASH barges or conventional dry cargo vessels to the Middle East: American Export Lines, Central Gulf Steamship Corporation and plaintiff Waterman.

When MSC exercised its option to require plaintiff to offload the LASH barges, the contract explicitly provided that the basic FIO rates would be "increased" by the offloading charges; and the table of offloading charges reiterated that they were to be "added" to the basic FIO rates (16a-17a, 18a). There is additional evidence elsewhere in the contract that the parties negotiated and intended that the carrier's compensation for discharging cargo from either LASH barges or conventional break-bulk vessels would always be reflected by an increase in the basic FIO rates for ocean carriage. Thus, Article 9, covering discharge at Wake Island, expressly provides that "the basic rate for the carriage of such cargo shall be increased by the offloading charge" (16a).

Such an increase is also found in the Suez Canal surcharge (17a). Indeed, there is a definite parallel structure and connection between the freight terms of Article 12(c), which pertain to offloading, and the freight terms immediately following in Article 13, which cover the Suez Canal. Any doubts whatever, about the status of offloading charges as part of the freight rate, are settled by the terms of Article 13, providing that the Suez Canal surcharge applies to the "rates," which "in accordance with commercial practice," comprise both the "basic rate" and the rate increase for offloading services (17a).

It may be noted that the provisions for both offloading charges and Suez Canal surcharge recite that they were intended to "cover" certain additional "costs" of the carrier (17a). Nevertheless, it is apparent that the parties did not literally intend to tie the rate increases to actual costs. There could be no such additional offloading costs created by a voyage around the Cape of Good Hope. Yet

the plaintiff is clearly entitled to apply the Suez Canal surcharge to the rate increase for offloading charges.

There is a very precise distinction drawn in the contract between "rates" and basic "FIO rates." The provision for offloading charges explicitly refers to an increase in the "FIO rates." However, both the Suez Canal and the exclusive use clauses refer to calculations based on the "rates."

As previously indicated, the term "rates" in the Suez Canal clause is defined to mean more than just the basic "FIO rates." The term "rate" in the exclusive option likewise encompasses more than just the basic "FIO rates" since concededly the Suez Canal surcharge applied in computing the minimum charge. It follows as a matter of fundamental logic, simple grammar, and basic contract construction that in the exclusive use option, the increase for offloading services should be included in the "rate" used to compute the minimum charge.

Defendant is obviously content with the express terms that arbitrarily connect the exclusive use option first to the NOS rate, and then to the lowest commodity rate, without regard to the actual characteristics of the cargo (16a, 20a). But defendant balks at including the explicit rate supplement for offloading services in the computation of the minimum charge. This untenable position blithely ignores the provisions for the basic "FIO rate" to be "increased" by "adding" on the offloading charges.

Defendant proposes a construction of the contract which would apply the three parts of the rate separately: the basic rate multiplied against minimum tonnage, and the increase for offloading charges multiplied against actual tonnage, with the Suez Canal surcharge then applied inde-

pendently to both.² Such a construction, however, does violence to the contract language, by substituting the concept of adding the offloading charges to the ocean "freight," rather than to the expressly designated "rate."

Perhaps the contract could have been written that way; but then again, perhaps plaintiff would not have agreed to it. "Freight" is a product of the "rate"; "freight" is not itself a "rate." The parties clearly negotiated the terms of the contract to provide for offloading charges as an integral part of the "rate," which is multiplied as a factor in producing the total "freight," and not just added on to it.

The simple truth is that defendant now seeks to escape from its bargain. In the absence of any economic analysis of the catastrophically depressed state of the shipping market since the 1973 oil crisis, MSC can hardly maintain that it entered into a "bad" bargain. Indeed, whether it was a "good" or "bad" bargain is irrelevant. No doubt, if plaintiff sought to prove it lost money in the trade and prayed for a recovery of its losses, defendant would be the first to object. Under these circumstances, defendant should be held to its bargain, and required to honor its obligations. *Standard Title Ins. Co. v. United Pac. Ins. Co.*, 364 F.2d 287 (8 Cir. 1966); *National Equipment Rental v. Reagin*, 338 F.2d 759 (2 Cir. 1964). As the Eighth Circuit held in the *Standard Title* case, if "the contract is not ambiguous, then its provisions as written must be accepted without resort to any rules of interpretation and intent

² Plaintiff's option to invoice the basic rates separately arose as part of MSC's standard billing instructions. It simply enabled plaintiff to collect for the ocean carriage within 48 hours after the vessel had arrived at destination which, if there were port congestion, could be days or weeks before discharge was completed.

of the parties must be determined from the language used in the written contract." 364 F.2d at 289.

B. The Court Below Confused "Freight" With "Rate."

Unfortunately, in the decision below, the district judge inexplicably overlooked the table of "FIO rates" included in the contract (19a) and he became confused not only about this contract but about ocean "freights" and "rates" generally. He obviously believed that a "rate," which is a price per ton, was the equivalent of "freight," i.e. the total amount paid for the carriage of cargo. Thus, he misdescribed as a "rate" that the cargo was to be "freighted on a minimum basis" (42a). However, the minimum charge for exclusive barge use is clearly the "freight" and not just a "rate."

By mislabeling the minimum charge as a "rate," the court below misled itself into concluding that "there could be nothing to increase [by the offloading charges] if no basic freight rate were established; in order that it be so established, the minimum basis must first be taken into account" (42a). In other words, the district judge held that the basic "FIO rate" referred to in the offloading option could not be ascertained without first establishing the freight designated as a minimum charge for exclusive barge use. While he properly recognized that this conclusion was "senseless," the district judge unhappily did not perceive that his own errors had led him astray.

The decision below does not bind this Court in any way since it was entered on cross-motions for summary judgment, without oral argument, on the basis of documents alone, and involved purely a question of law in construing the contract terms. *Law Research Serv. v. Crook*, 524 F.2d

301, 319 (2 Cir. 1975); *Stamcarbon v. American Cyanamid Co.*, 506 F.2d 532, 537 (2 Cir. 1974); *Eddy v. Prudence Bonds Corp.*, 165 F.2d 157, 163 (2 Cir.), cert. denied, 333 U.S. 845 (1948). As this Court held most recently in the *Law Research* case, it has "untrammelled power to interpret written documents." 524 F.2d at 319.

The contract terms here are clearly stated. The offloading charges should be taken into account in computing the minimum charge for exclusive barge use.

II.

Any ambiguity should be resolved against defendant.

If the contract were at all ambiguous, plaintiff would be entitled to a "reasonable and practical" construction in its favor, since a contract is generally "construed most strongly against the drafter, which in this case was the United States." *United States v. Seckinger*, 397 U.S. 203, 210-11 (1970); *Instruments for Industry v. United States*, 496 F.2d 1157, 1161 (2 Cir. 1974); *J.W. Bateson Co. v. United States*, 450 F.2d 896, 902-04 (Ct. Cl. 1971); *Jones v. United States*, 304 F. Supp. 94, 101 (S.D.N.Y. 1969), aff'd, 421 F.2d 835 (2 Cir. 1970). As this Court held in the *Instruments for Industry* case, the "Government, as the author, has to shoulder the major risk of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions." 496 F.2d at 1161. The Court went on to observe that if Government "chafes" under this risk, it can obtain relief "by a more meticulous writing of its contracts." *Ibid.* The Government should not be heard to claim a "lack of clarity" in its own contracts since, as the drafting party, it "could have forestalled the controversy." *Ibid.*

Contrary to the erroneous assumption of the district judge (43a), plaintiff does not argue that the actions of MSC's officials, in making full payment initially on plaintiff's invoices for the three voyages from Baltimore, constitute an admission by defendant about how the contract should be construed. The different treatments given by MSC's officials to the invoices on all ten voyages are, however, of no small significance. At the very least, they deprive defendant of any basis for arguing that the contract terms are unambiguous. By contrast, plaintiff is under no similar disability; it has consistently maintained that the contract terms, which defendant drafted, are clear.

Moreover, if the court were to find ambiguity in the contract, then as previously indicated, plaintiff would be entitled to a reasonable construction in its favor. The reasonableness of plaintiff's construction of the contract is manifestly supported by the fact that on the three voyages from Baltimore, MSC itself "placed the same interpretation on it." *Rawleigh, Moses & Co. v. United States*, 475 F.2d 606, 611 and n.12 (Ct. Cl. 1973); *General Warehousing Two v. United States*, 389 F.2d 1016, 1020 (Ct. Cl. 1967).

CONCLUSION

For the foregoing reasons, the decision of the court below should be REVERSED and the case remanded with directions that judgment be entered in plaintiff's favor with interest³ and costs.

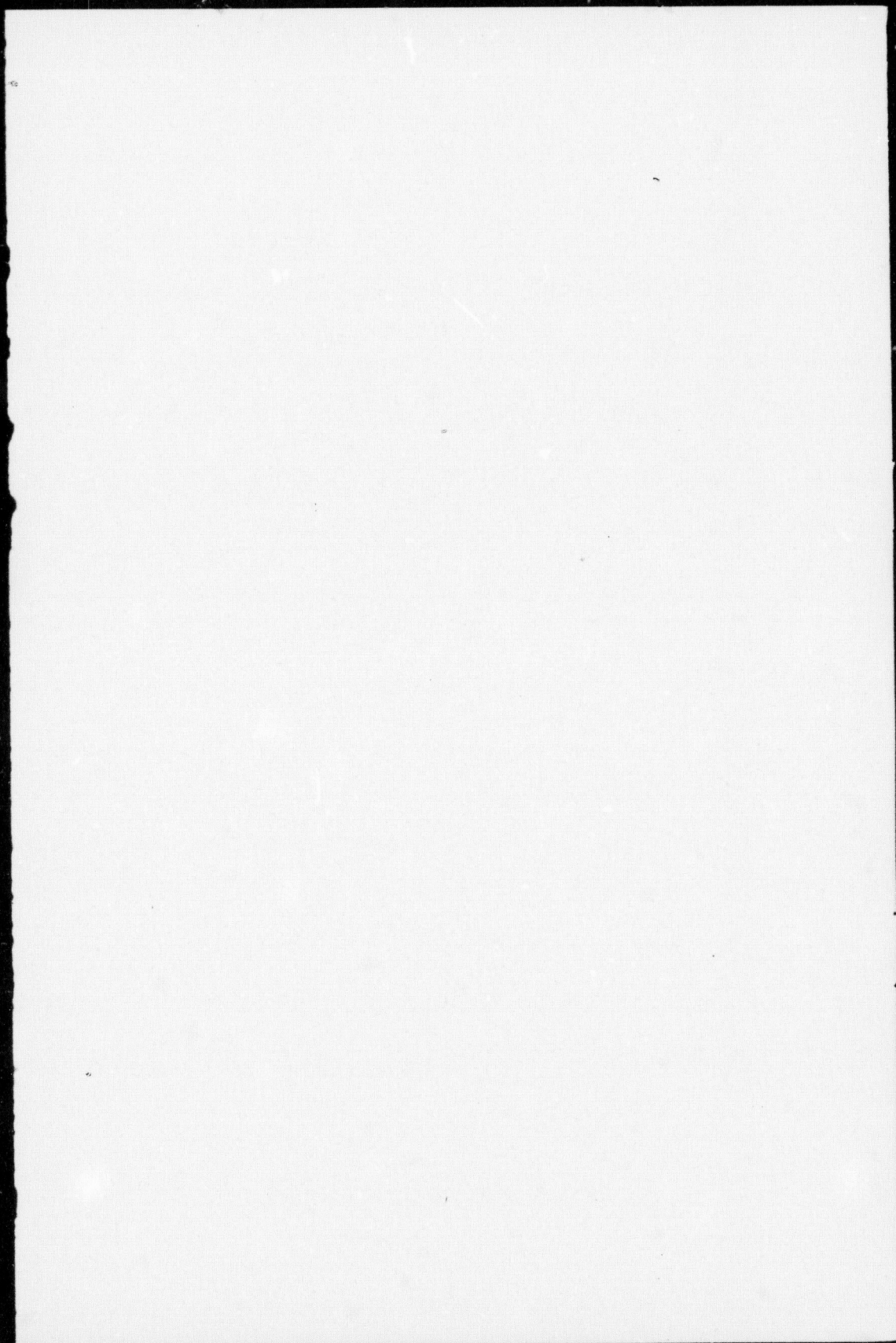
Dated: New York, New York
December 27, 1977

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff-Appellant
Waterman Steamship Corporation
One Battery Park Plaza
New York, New York 10004
(212) 422-7585

MICHAEL MARKS COHEN,
Of Counsel.

³ Under the Suits in Admiralty Act, simple interest at the rate of 4% shall run "as ordered by the court" for the period after suit is brought. 46 U.S.C. § 743, 745; *United States v. Isthmian S.S. Co.*, 359 U.S. 314, 325 (1959). The complaint herein was filed and served on November 22, 1976.



AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF NEW YORK

} s.s.:

James P. Sawicz, being duly sworn, deposes and says that he is a clerk in the office of Burlingham Underwood & Lord, *attorneys* for Appellant - Waterman Steamship Corp. herein; that on the *21st* day of *February*, 1978, he served the within *Brief For Appellant - Waterman Steamship Corp* by mailing ^{*two copies*} a ~~true copy~~ thereof, *(VPS)* securely enclosed in a postpaid wrapper, in the post-office box regularly maintained by the United States Government at One Battery Park Plaza in said County of New York, to each of the following:

Civil Division, Appellate Section

Department of Justice

Washington, D.C. 20530

attn: Michael Kimmel, Esq.

The address of each of the above is the address designated by each of them for that purpose upon preceding papers in this action, or the place where each then kept an office.

Sworn to before me this

day of

21st
February, 1978.

Regina H. Blenk

James P. Sawicz

REGINA H. BLENK
Notary Public, State of New York
No. 41-4507613
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1979